THE

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PRIVY COUNCIL JUDGMENTS.

Maung Kyin v. *Mashieve La* :—The decision of the Privy Council in this case reported in [1911] 2 M. W. N. 30 is not calculated to allay the dissatisfaction felt by the profession with some of the latter day Judgments of their Lordships, but on the other hand would tend to deepen the same. In former years when intricate questions of law went up to the Privy Council for adjudication, their Lordships used to deal with them in very elaborate and learned judgments which set the matter at rest once and for ever. We need only refer to the decisions in *Hanuman Pershad's* case, *Deendyal's* case, and the *Tagore case*, which are still regarded as classics in the several departments of Hindu jurisprudence to which they related. Of late, however, their Lordships' Judgments have come to resemble the pronouncements of the Delphic Oracle ; and they have given rise to more difficulties than they solved. *Thakoorain's case* 28 All. 727, and *Bajranji Singh's case* 30 All. 1 are examples of such decisions ; not that we do not occasionally come across epoch-marking judgments laying down the law in unmistakeable terms for all time to come, as from the pen of Lord Macnaghten, but these have become the exception rather than the rule.

In the present case the respondents sued the appellants to recover possession of certain parcels of land under certain deeds which purported to be absolute conveyances. The appellants contended that the said conveyances were meant to be, and had always in fact been, treated by all the parties concerned as mortgages only, and they tendered evidence of acts and conduct of the parties to that effect. This evidence was excluded by the Courts below under S. 92 of the Indian Evidence Act. The principal question arising on this appeal was stated by Lord Robson, who delivered the Judgment of the Judicial Committee, to be "whether or not that evidence was properly rejected." Their Lordships then described in general terms (See p. 34 of the Reports) the evidence which the appellants proposed to tender ; and without expressing any opinion on the construction or application of S. 92 I. E. A., held that the rejected evidence should be heard, "subject to any objections that the respondents might take," and remanded the case to the Chief Court of Lower Burma for a new trial.

We are constrained to observe that the manner in which the Privy Council have disposed of this case is far from satisfactory. The question which arose on the appeal was correctly propounded by Lord Robson ; but his Lordship carefully avoided giving any definite answer to it. In one place he says : that the evidence which the appellants proposed to give "related to the *acts and conduct of the parties* as distinguished from evidence of *oral statements and conversations* constituting in themselves some agreement between them." Later on "their Lordships are of opinion that the case for the

appellants disclosed a charge of fraud against the respondents in relation to matters *antecedent to those deeds,* on which *much* of the evidence tendered would be material." And "it (S. 92) does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance."

In so saying, their Lordships suggest more than one ground on which such evidence would be admissible. In the first place, they seem to think that acts and conduct of parties as opposed to oral statements and conversations are not excluded by S. 92 of the I. E. A. Their Lordships, no doubt, do not decide this point but we are afraid, that this case will be quoted and used hereafter in Indian Courts as authority for such a position. In so far as it countenances the distinction between oral statements and acts and conduct of the parties, the Privy Council seem to have gone back on their previous decision in *Balkishen* v. *Legge* where Lord Davey says "their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92 of the Indian Evidence Act (Act I of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, or adding to, or subtracting from, its terms subject to the exceptions contained in the several provisoes. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which are referred to by the learned Judges in the High Court have not, in the opinion of their Lordships any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

Before that decision it was held in a number of cases following the English Equitable doctrines of part performance and Equity that the evidence of conduct was admissible [5 W. R. 68 ; 4 Bom. 609; 13 Mad. 494; 16 Mad. 81 ; and 25 Cal. 603 F.B.)] Since *Balkishen's Case* the Madras and the Bombay High Courts have held following the same, that parol evidence of couduct is excluded by S. 92 of the Indian Evidence Act [7 Bom. L. R. 609 ; 30 Bom. 119 and 25 Mad. 7].

There has been no reported decision of the All. H. C. subsequent to the 22 All. case, to show how the learned Judges of that Court understood the P. C. decision. But in Calcutta, there has been some conflict of opinion in construing it Two cases 28 Cal. 256 and 289, have distinguished the P. C. case on the ground that it expressly excludes *only* oral evidence of intention and that their Lordships do not lay down any rule of exclusion of evidence over and above that contained in S. 92 and following 25 Cal. 603 have affirmed that S. 92 while it excludes evidence of any oral agreement or statement, does not exclude evidence of the act and conduct of the parties not being in the nature of an oral agreement or statement. A somewhat different view approximating to the Madras and Bombay views was taken in

28 Cal. 70 and 5 C. W. N. CCXCVI. The observations in the present case seem to put the stamp of approval of their Lordships of the P.C. on the distinction drawn by the Calcutta Judges—a distinction which, as Dr. Ghose says, is hardly reconcilable with the principle on which the rule of exclusion embodied in S. 92 is founded.

The real ground on which such conduct was admitted in evidence has been stated by Bashyam Iyengar, J. to be "that the conduct leads to the inference that there was a contemporaneous oral agreement or statement between the parties that the absolute sale-deed was to operate only as a mortgage." To allow such evidence in the face of S. 92. involves in the words of Muthusami Iyer, J. 'the anamoly that while indirect evidence of the true oral agreement is admissible, notwithstanding S. 92, direct evidence of the same is not admissible.' Such an interpretation would open the widest door to fraud and perjury, and it is regrettable that their Lordships should have expressed themselves in this case in a manner which may be taken to shake the authority of *Balkishen's case*.

The real ground of the decision seems to be that there was *fraud* on matters antecedent to the deeds in question and the appellants are entitled to give evidence of such fraud. Their Lordships are trying to bring the case within proviso 1 to section 92 though they do not in terms refer to it. But wherein did the fraud consist? The facts are that the respondent knew, as well as the appellents, that the latter were only mortgagees of the suit property and knowing that, took the deeds of 1903 which purported to be absolute conveyances. It is not suggested that the deeds of 1903 were brought about as the result of fraud perpetrated by the Respondents on the Appellants as for instance the fraudulent insertion of any material term, etc; nor can it be said that the appellants and the respondents conspired together to defraud the original mortgagor, for he appears to have taken part in the negotiations which resulted in the execution of the deeds of 1903. The evidence set out by their Lordships does not go to prove any fraudulent scheme and with all respect we are of opinion that the mere knowledge of the respondents in this case that the property belonged to a third person cannot be taken as proof of fraud. "A finding of fraud should be reserved for that which is dishonest and morally wrong and it is not sufficient to come to a vague and general finding of fraud. Actual fraud must be established." Per Sir Lawrence Jenkins, C. J. in 38 Cal. 622 at p. 626. At the best, the knowledge of the respondents can only be evidence of an oral agreement to treat the deed as a mortgage though it purported to be a sale. And the oral agreement being inadmissible, we have to fall back upon the distinction between acts and conduct and oral statements.

Lord Robson in the course of his Judgment has said that such evidence is only proof of a fraudulent dealing with a third person's property. His Lordship in so stating would seem to have in mind the protection of the rights of an innocent third party and in the present case of the mortgagors: The facts are that the orginal mortgagor K executed to the Appellants in November 1901 what purported to be an absolute conveyance of some of his properties and the appellants themselves bought in Court auction in 1902 the other suit properties. The appellants say that both the sales including the court-sale were in substance mort-

gages. It is this right of the appellants in the suit properties that was conveyed to the respondents by the deeds of 1903: Now the Privy Council have laid down that evidence as between the appellants and the respondents is admissible, to prove that whatever the terms of the documents of 1903 may have been, none of the parties had acted on them as effecting an absolute sale.' We shall now see what this will lead to. We shall take it the appellants succeed in proving that the respondents got only a mortgage right and are allowed to redeem the Respondents on the ground that what they obtained by the ostensible sale deed was only a mortgagee's right. How does this benefit the mortgagor? In a suit by him against the appellants, the appellant will certainly be entitled to rely on S. 92 of the I. E. Act—the construction of which their Lordships at present advisedly refrain from considering—to shut out any evidence to prove that the sales in favour of the appellants were only mortgages. And thus their Lordships' conclusion in the present case would only help the appellants to secure the property to themselves. And if this result is to be averted the distinction pointed out by the Calcutta High Court between oral statements and conduct will have to be resorted to. It is really unfortunate that the Privy Council did not make their meaning more clear than it is. In the words of Lord Bramwell "This is the result of a disregard of general principles and general rules in the endeavour to do Justice more or less fanciful in certain particular cases."

Mirza Sadik Hussain v. *Mussamut Kaniz Zohra Begum*:—In this case, [(1911) 2 M. W. N. 132] their Lordships of the Privy Council hold that the Court has power under Section 510 of the Code of the Civil Procedure (Act XIV of 1882,) to appoint a new arbitrator in the place of another when that other has refused to accept the office of an arbitrator and their Lordships have overruled the decisions in 6 Madras 414 and 18 Calcutta 324.

With great deference to their Lordships, we must submit that we entertain grave doubts as to the correctness of the conclusion arrived at by their Lordships. The Code certainly makes a distinction between refusal to accept office and refusal to act after accepting the nomination. Section 507 lays down the circumstances under which the Court can nominate an arbitrator when the one nominated by the parties has refused to accept the office. The Court has jurisdiction under Section 507 to nominate an arbitrator *only if the parties desire that the nomination shall be so made, otherwise not.*

It is only after the Court is satisfied that the arbitrators named by the parties have accepted the nomination or where the Court has nominated arbitrators under Section 507 that it proceeds to make an order of reference under section 508. Then follows section 510 which provides for the appointment of arbitrators by the Court when the contingencies therein mentioned arise.

The section runs as follows:

"If the arbitrator or where there are more arbitrators than one, any of the arbitrators or the umpire dies or refuses or neglects or becomes incapable to act, etc., the Court may in its discretion appoint a new arbitrator, etc."

In our opinion, the refusal to act contemplated by this section, can only mean refusal after acceptance of the nomination. If as laid down by their Lordships, the cases of refusal to accept nomination are also covered by section

510, and if the Court has power to appoint new arbitrators, even when they refused to accept nomination under section 510, even against the desire of the parties, the second clause of section 507 would become nugatory and superfluous. The result will be that if section 507 is applied, the Court has no power to appoint an arbitrator in the case of refusal to accept nomination, unless the parties concur in requesting the Court that the nomination shall be made by the Court. But if the construction of their Lordships is right, section 507, cl. (2) can be evaded by invoking the aid of Section 510. What is impliedly prohibited by section 507, cl. (2) can be done under section 510.

Under the new Code, no doubt, the power is given to the Court to appoint new arbitrators both in cases of refusal to accept the office of the arbitrator and in cases of refusal to act after acceptance (See Schedule 2, para. 5 of the Code of 1908). In the new Code, the second clause of section 507, is removed from that place and put in under the section corresponding to section 510.

In this connection we may also refer to the recent Full Bench case [1911 (1) M. W. N. p. 151] in which their Lordships the Chief Justice, Krishnaswamier J. and Ayling, J. hold that where two out of five arbitrators refuse to act and the Court appointed two other arbitrators in their place without the parties desiring the same, the award passed in pursuance thereof was not a valid award. This opinion of the Full Bench which proceeds upon the decisions in 6 Mad. and 18 Cal. must now be taken to have been overruled by the Privy Council. But we have indicated above how the conclusion of the Privy Council is opposed to the sections of the old Code. The matter is not however, of much practical importance having regard to the change effected by the new Code.

RYOTI LAND AND PRIVATE LAND.

(Continued from page 27).

First then with regard to the meaning of sub-section (3) to section 8. It lays down that the merger of occupancy rights under sub-sections 1 and 2 to section 8 shall not have the effect of converting ryoti land into private land. The expression *ryoti land* occurs in the various sub-sections to sections 6 and 8 which have a bearing on the question under consideration. The landholders contend that the expression "ryoti land" in sub-section 1 to 6 means land that was ryoti on 1st July 1908 or which became ryoti thereafter and not land that was ryoti at one time. They point to section 3, clause 7 (2) and section 8 (4) among other provisions of the Act to show that every occupant at the date of the Act of what was once a ryoti land need not necessarily be an occupancy ryot and to section 6 (2) to show that it was not the policy of the Act in all cases where a landholder admits a cultivator to land that was once ryoti that he should necessarily part with occupancy rights to him. It is also pointed out that there is no section in the Act which expressly renders invalid any contract entered into between a landholder and a ryot before the passing of the Act by which the latter agreed to hold a land which was once ryoti land as the former's private land. It is not the policy of the Act that ryoti land can never be made private land. The proviso to section 185 shows that it is no part of the scheme of the Act to make it impossible to convert

ryoti into private land. There are other indications of this nature in the Act. The recognised principles of law are in favour of allowing a landholder full liberty to deal with land which comes into his possession so as to be at his disposal. For these and other considerations of a similar nature the landholders claim that section 8 (3) merely says that merger *by its own operation* does not convert a ryoti land into private land and that it does not touch cases where after the merger the ryoti land was converted by an express agreement, specific mode of letting or other mode of dealing with it, into private land, for nothing that is contained in sections 6 and 8 prohibits such conversion. If an express provision is wanted for this position they cite section 181 which lays down that sections 6 and 8 do not apply to private land, that is to say, to land which became private land at the commencement of the Act.

With these principles in mind the landholders turn to section 185 which 'lays down the rules for the determination of the landholders' private land. Local custom letting as private land before 1st July 1898 and other evidence that may be produced will be of value according to them even when the land was once ryoti. Neither section 185 nor any other provision in the Act lays down that a ryot shall have permanent right of occupancy in all land which was at any time ryoti; on the other hand as pointed out already there is no section invalidating a contract with respect to the existence or non-existence of occupancy right in any land which was at the disposal of the landholder at the time of the admission of any cultivator into possession of it. Section 185 gives effect even to a local custom. If we are to restrict the operation of section 185 only to those cases where no evidence as to the land being once ryoti is forthcoming, then it is difficult, the landholders argue, to give due effect to the recognition of local custom as an evidence in determining whether any land is private land.

This is an extreme view in favour of the landholders. According to the view the landholder is at liberty to claim that a ryoti land which came into his possession even in the very year which just preceded the passing of the Estates Land Act has been private land by means of an agreement, or a specific mode of letting or dealing with it or by the operation of a local custom which obtains in this part of the country. Some advocates of the landholders' rights who are not for going so far are of opinion that the provisions of the Act do not permit an extension of the principle of the liberty of contract to such an extent as those who uphold the extreme view wish to carry it. Their position in this section 185 deals with three species of evidence. (1) Letting as private land before the 1st date of July 1898. 1st July 1898 was the date of the publication of the draft Tenancy Bill containing the provisions restricting the landholders' rights in land which came into his possession. Any letting as private land after that date would be of no avail as it could be set down to a conscious attempt on the part of the landholders to frustrate the intention of the legistature to extend the occupancy right of tenant, in anticipation of the legislative measures that were in contemplation. (2) Any other evidence that may be produced. The same words occurring in sub-section 2 to section 120 of the Bengal Tenancy Act were explained in *Nilmoni Chuckerputtia*

v. *Bykant Nath Bira*, 17 Cal. 466, as evidence showing that prior to 1st July 1898 the land was treated as private land. Their Lordships say "In this view we think that the following words in the sub-section 'any other evidence that may be produced' must mean any other evidence tending in the same direction that may be produced to show the assertion of any title on the part of the proprietor and communicated to the tenant before that date." So the landholder cannot say that subsequent to 1st July 1898 he became the owner of some private land in any of these ways, the only exception to this being the case in which local custom may be established. (3) Local custom. This however may be set up with respect to land which came into the landholder's possession either before the Act or after the Act. For practical purposes however it will hardly be possible to establish such local customs. So the landholder should prove that at the commencement of or before the Act the land was private land. Apart from local custom he can do it in one of two ways; (1) letting before 1898 or other dealing with it as private land before 1898. (2) Cultivating it *as private land* by hired labour &c., as laid down in the proviso to section 185. In the light of this view of section 185, sub-section 3 to section 8 is so interpreted as to permit the conversion of ryoti land into private land, by letting or other dealing with it only when the merger had taken place before 1898. If the merger had taken place before 1898 the landholder could convert the land into private land-apart from private cultivation under the proviso or local custom by letting or dealing with the same as private land before 1st July 1898 but could not do so in any other way. This is a moderate view in favour of the landholder for it does away with the liberty of contract to a large extent.

If either of these views were accepted it follows that section 6 (1) confers occupancy right only in what is ryoti land at the date of the Act and taking it with section 185 it is clear that it does not confer occupancy rights on ryoti land which was let or dealt with as private land before 1st July 1898, that is in land which was once ryots' but had become private land by any act of the landholder which would according to the ordinary principles of law have the effect of converting it into private land. And section 8 (3) should not be taken as if preventing him, for ever, from converting it into private land. Then the answer that we shall have to give in regard to the first class of lands (lands which came into landholders' possession by relinquishment or purchase) would be that in them the holders cannot claim occupancy right under section 6 (1) of the Act.

It appears to me that the views set forth above ignore altogether not only some of the fundamental principles of the Estates Land Act but also the plain wording of some of its provisions. The arguments that can possibly be urged on behalf of the landholders are set forth in some detail for the arguments themselves suggest the answers to those who pay some close attention to the provisions of the Act. The two intrinsic principles underlying the Act as explained by the Hon'ble Mr. Forbes are the recognition of the ryots' occupancy right and the protection and conservation of the domain in which he may exercise his occupancy right. The legislature gave recognition to the ryots' occupancy right by means of declaration which is embodied in sub-section 1 to section 6.

Having regard to the history of landholding in estates in this presidency it is impossible to contend that the said declaration of occupancy rights is not justifiable. The position that according to the common law of this country a Zamindari ryot is a co-owner of the holding with the landholder and that the kudivaramdar is not a tenant in the sense in which that term is used in the English Law was fairly well established long before the Estates Land Act was passed. But in the absence of a statutory declaration to that effect the court did not always respect the ryots' occupancy right the existence or otherwise of which was treated as a question of fact depending upon the amount of proof that was produced in each case. The very object of a declaratory statute is to remove the uncertainty and to lay down what the common law had been and what it shall be. "Statutes are declaratory of the common law when the old custom of the Kingdom has almost fallen into disuse or become disputable in which case the Parliament has thought proper in *perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been" 1 Bl. Com. 86. In *Jones* v. *Bennett* (1890) 63 L. J. 705 at p. 708. Lord Coleridge, C. J. said "A declaratory Act means to declare the law, or to declare that which has always been the law, and there having been doubts which have arisen, Parliament declares what the law is and enacts that it shall continue what it then is."

Such being the nature of a declaratory statute effect should be given to it despite anything to the contrary. In *Attorney-General* v. *Theobald* (1890) 24 Q. B. D. 557 at pp. 559-560 Pollock B said. "The case of *Attorney-General* v. *Hertford* in the Court of Exchequer is a strong authority, that if an Act is in its nature a declaratory Act, the argument that it must not be construed so as to take away previous rights is not applicable." A declaratory statute may have the effect of nullifying contracts entered into before it was passed. The following observations of Pollock, C. B. in *Oswald* v. *Berwick* (1854) 3 E and B 653 at p. 678 may be quoted here with advantage. "I think every contract which does not *expressly* provide to the contrary must be considered as made with reference to the existing state of the law; and if by the intervention of the legislature a change is made in the law which in any degree affects the contract made without some clear and distinct reference to the prospect or possibility of a change in the law, does not hold with reference to the state of things as altered by the new law. I am not aware that there is any authority which expressly decides this, but also I am not aware that there is any authority to the contrary. And I think that the intervention of the legislature in altering the situation of the contracting parties in principle is analogous to a convulsion of nature against which parties may provide but if they have not provided it would generally be considered as excepted out of the contract." Again statute creating new rights stand on a different footing from those creating new obligations (vide Wilberforce on Statute Law page 157). Bearing these principles in mind it is clear that section 6, sub-section 1 applies notwithstanding any *contract* or *usage* to the contrary.

(*To be continued.*)

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